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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANNA MARIA LONGORIA, Defendant and Appellant.	B203265 (Los Angeles County Super. Ct. No. PA057096)
In re ANNA MARIA LONGORIA, on Habeas Corpus.	B212313

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Schuit, Judge. Affirmed.

PETITION for Writ of Habeas Corpus. Order to Show Cause issued, returnable in the Superior Court.

Charles R. Khoury, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

Anna Maria Longoria appeals from the judgment entered following her plea of no contest to petty theft (Pen. Code, § 484, subd. (a)).[1] Imposition of sentence was suspended and she was placed on summary probation for three years, with the condition that she pay victim restitution in the amount of $37,945.73. On appeal, Longoria contends the trial court erred in making the restitution award. In her accompanying habeas corpus petition, she contends the restitution award was the result of ineffective assistance of counsel.

The judgment is affirmed. Finding that Longoria's habeas corpus petition states a prima facie case for relief, we issue an order to show cause returnable in the superior court.

FACTUAL BACKGROUND[2]

In April 2006, David Krumseik was looking after a property on Haskell Avenue in Los Angeles County for his mother, Betty Krumseik. The property was the family house in which David and his sister, Katherine Mencia, had grown up. After her husband died, Betty continued to live in the house until, at some point prior to the events at issue here, she moved out, leaving her possessions inside the house and the garage. Betty asked David to keep an eye on the vacant property.

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1 All further statutory references are to the Penal Code unless otherwise specified.

2 The statement of facts is taken from an incomplete preliminary hearing held on November 14, 2006, and from subsequent hearings addressing the restitution question.

When David visited the property on April 19, 2006, he saw the front doors of the house were open and that a rear window had been removed and placed on the ground. David had been at the property about a week earlier, at which time he verified the front doors were locked and he noticed that the rear window was loose but still in place. David called the police and reported a burglary.

According to David, many things had been stolen, including a potter's kiln, a collection of Breyer horse statues, an antique clock and a Franciscan silverware set. The police showed David some items that had been recovered from codefendant Alberto Magallon. David identified these items as having come from his mother's house.

On August 18, 2006, a felony complaint was filed charging Magallon and defendant Anna Longoria with two felonies. Count 1 charged that "[o]n or between April 9, 2006 and April 19, 2006," Magallon and Longoria had committed first degree residential burglary by entering "an inhabited dwelling house . . . with the intent to commit larceny and any felony." Count 2 charged that, during that same time period, Magallon and Longoria had committed grand theft by taking the items police recovered from Magallon's house, described as "personal property of a value exceeding . . . [$400], to wit 1 electric air compressor, 1 outdoor lights [*sic*], 1 snow sled, 1 radio, 1 figurine [from] the property of David Krumseik, Betty Krumseik."

David testified at the November 14, 2006, preliminary hearing that the value of the recovered items was $710. His testimony was interrupted when both defendants decided to accept plea bargains. Magallon pled no contest to the felony grand theft charge and Longoria pled no contest to a lesser included offense of misdemeanor petty theft. Longoria's plea agreement specified she would be put on summary probation and that a hearing to fix the amount of victim restitution would be held in the future.

On March 2, 2007, David's accounting for property that had been stolen, but not recovered, was presented to the trial court and the parties. The trial court subsequently described this material as "indicating that the restitution total is $41,040.73. There is a detailed listing of how that figure was arrived at as well as a stack of documentation with photographs to allow the court to see what the items may have looked like and what their

current value might be." This documentation included more than 50 pages, downloaded from various internet sites, giving descriptions, prices and sometimes photographs of the stolen items, which ranged from the already-mentioned potter's kiln and antique Breyer horse statues, to a safe, an archery set, silverware and towel sets. There was also a two-page list claiming a specific value for each stolen item and citing a particular internet source for that value. In response to Longoria's request for time to prepare a response to David's documentation, the trial court continued the restitution hearing until May 11, 2007. Following several more continuances for other reasons, the restitution hearing resumed on August 31, 2007.

David told the trial court his parents had been "pack rats" and that their house had been "crammed full of merchandise." Many of the items were "never taken out of the packages . . . [and s]till had the store . . . tags." In some rooms, "stuff was stacked practically to the ceiling." Based on information gleaned from the internet, David said one of the stolen items, the potter's kiln, was actually worth about $3,000 less than his documentation indicated.

Sharlene Bouldin addressed the court. Bouldin described herself as an old friend of Barbara Harris, David's wife, and said she had been inside Betty's house: "[I]t . . . was a mess stacked to high heaven. Everywhere you went, even the bathroom, just totally to the ceilings with brand new sets of towels, even the J.C. Penney tags were still left on all of them. [¶] I was sort of delirious about . . . what kind of a person would . . . stock up like this but everything was in sets. Kitchen sets, towels, sheets, blankets, you name it. It was a large volume of everything with the sale tags still left on them. That's why it stuck with me. It was astronomical . . . ."

Katherine Mencia, David's sister, told the court: "The [Breyer] horses, I had about 200 of them. I used to collect them as a child. . . . So there were a lot of them and my brother had some as well. [¶] And as to my mother's tendency to buy in bulk, yes, she did." "When I've been in her house near my father's death and shortly afterward, she still bought in bulk. . . . The shopping bags from the store, with the items inside. [¶] . . . [T]hat was her tendency."

Finally, David's wife, Barbara Harris, addressed the court. "I was the one who went into the house initially to try to clean it up. And it was indescribable. . . . [T]here were no more pathways. There was so much stuff. I found bags and bags of Fedco merchandise with the tags still on. . . . She was a compulsive shopper. And so that's why there was so much stuff. And I compiled the list and did all the research. And . . . I know that there was probably twice as much stuff as I got on the list because we just . . . couldn't remember a lot of things."

Longoria's attorney asked the trial court for additional time to hire experts so she could contest the restitution amount. The trial court denied the continuance request and ruled: "If I make an adjustment for the kiln which is no longer [$]7,695 but which is now about $4,600 according to Mr. Krumseik, the value of the loss comes to $37,945.73. That's the amount I'll order. Will be joint and several."

CONTENTIONS

1. The restitution award must be reversed because it was not supported by sufficient evidence.

2. The trial court erred by not granting a continuance.

3. The restitution award must be reversed because defense counsel rendered ineffective assistance of counsel.

DISCUSSION

1. *The restitution award was supported by sufficient evidence.*

Longoria contends the restitution award was improper because it was not supported by sufficient evidence. She also contends the manner in which the restitution hearing was conducted denied her due process. These claims are meritless.

a. *Legal principles.*

"In 1982, California voters passed Proposition 8, also known as The Victims' Bill of Rights. At the time this initiative was passed, victims had some access to compensation through the Restitution Fund, and trial courts had discretion to impose restitution as a condition of probation. [Citations.] Proposition 8 established the right of crime victims to receive restitution directly 'from the persons convicted of the crimes for

losses they suffer.' (Cal. Const., art. I, § 28, subd. (b).)" (*People v. Giordano* (2007) 42 Cal.4th 644, 652.) "Penal Code section 1202.4 now requires restitution in every case, without respect to whether probation is granted. In addition, . . . Penal Code section 1203.1, subdivision (j) provides broader discretion for trial courts to impose restitution as a condition of probation." (*Id*. at p. 653.)

Section 1202.4, subdivision (f), provides: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." Subdivision (f)(3) provides: "To the extent possible, the restitution order shall . . . identify each victim and each loss to which it pertains, and shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct . . . ."

While "the purpose of the restitution statute is to make that victim whole, not to give a windfall" (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 995), "[n]one of the cases hold that the victim must supply a sworn proof of loss or detailed documentation of costs and expenses." (*In re S.S.* (1995) 37 Cal.App.4th 543, 547, fn. 2.)

"[T]he standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt." (*People v. Baker* (2005) 126 Cal.App.4th 463, 469.) A restitution order is reviewed for abuse of discretion. (*People v. Mearns* (2002) 97 Cal.App.4th 493, 498.) "While we review all restitution orders for abuse of discretion, we note that the scope of a trial court's discretion is broader when restitution is imposed as a condition of probation. Penal Code section 1203.1, subdivision (j) expressly grants trial courts broad discretion in imposing conditions of probation. As this court has held, '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . ." ' [Citation.]" (*People v. Giordano, supra*, 42 Cal.4th at p. 663, fn. 7.) "A trial court abuses its

discretion when it determines [a restitution] award amount using other than 'a rational method that could reasonably be said to make the victim whole' or when an award is arbitrary or capricious." (*People v. Draut* (1999) 73 Cal.App.4th 577, 582.)

b. *Discussion*.

The essence of Longoria's claim is that David's self-drawn list of stolen items did not provide a legally sufficient basis for awarding him almost $38,000 in restitution. She argues "there is absolutely no proof that the items alleged to have been taken were even in the house. There is an assumption that every item that was taken was brand new and in boxes never opened. . . . Mr. Krumseik's story that his mother was a compulsive shopper and that the house was literally packed with 'like-new' items was quite frankly not believable." Longoria also argues the internet printouts did not adequately substantiate the claimed economic loss, and that the lack of sworn testimony on the matter violated due process.

Not so. "Section 1202.4 does not, by its terms, require any particular kind of proof. . . . [T]he trial court is entitled to consider the probation report, and, as prima facie evidence of loss, may accept a property owner's statement made in the probation report about the value of stolen or damaged property. [Citation.] Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant's criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim. [Citation.] The defendant has the burden of rebutting the victim's statement of losses, and to do so, may submit evidence to prove the amount claimed exceeds the repair or replacement cost of damaged or stolen property. [Citation.]" (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542-1543.)

"A property owner's statements in the probation report about the value of her property should be accepted as prima facie evidence of value for purposes of restitution. (Cf. Evid. Code, § 810 et seq. [providing 'special rules of evidence applicable to any action in which the value of property is to be ascertained.'].) ' "Due process does not require a judge to draw sentencing information through the narrow net of courtroom evidence rules . . . . [S]entencing judges are given virtually unlimited discretion as to the

kind of information they can consider and the source from whence it comes." [Citation.]' [Citation.] [¶] This is because a hearing to establish the amount of restitution does not require the formalities of other phases of a criminal prosecution." (*People v. Foster* (1993) 14 Cal.App.4th 939, 946-947.) "In many other contexts, an owner's opinion of the value of his or her property is sufficient evidence to establish value. (See Evid. Code, § 810 et seq.) There is no justification for requiring a *more* stringent rule in the context of the relaxed procedure of a hearing to determine conditions of probation. [Citation.]" (*Id*. at p. 948.)

In the case at bar, there was no probation report and the victim's opinion about the value of the stolen property was directly presented to the trial court. David and his wife, who were aware of the amount and kind of property Betty kept in her home, made a list of the things they believed were missing. This was sufficient evidence that the claimed property had been taken in the burglary. In addition, David's sister, Katherine Mencia, and his wife's friend, Sharlene Bouldin, told the trial court about Betty's shopping habits and the mounds of merchandise typically piled up inside her house. These statements provided a rational basis for concluding that all of the claimed property had been stolen.

As for the valuation of the stolen property, the documentation submitted by David was sufficient. There was nothing irrational about researching replacement costs for the stolen items on the internet. Longoria has not cited any authority finding fault with any similar, or even vaguely analogous, method of establishing a victim's losses.

Certainly due process requires that "[a] defendant must be afforded a reasonable opportunity to be heard on the issue of restitution," which necessarily entails sufficient notice of a restitution claim so the defendant has a "reason to contest the amount of damages" claimed. (*People v. Sandoval* (1989) 206 Cal.App.3d 1544, 1550; see *People v. Campbell* (1994) 21 Cal.App.4th 825, 831 [due process satisfied where defendant given opportunity to respond to issues regarding restitution].) But Longoria had adequate notice of the restitution claim. By March 2007, she had been given the two-page list specifying a replacement cost for each item, as well as more than 50 pages of supporting documentation. Longoria herself did not address the trial court at the

restitution hearing, but the record shows that was because she chose to be absent. (But see the discussion of Longoria's habeas corpus petition, *post*.)

While acknowledging that a restitution order is valid as a condition of probation so long as it "can be reasonably related to the offense underlying the conviction and can serve the purposes of rehabilitating the offender and deterring future criminality" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1119), Longoria argues the connection between her role in the theft and the amount of the restitution award is too attenuated: "There was no evidence in the record that she was even remotely responsible for the almost $38,000 in claimed losses to the Krumseik house. To the contrary, . . . Mr. Krumseik himself stated that 'almost everything was stolen on the first incident' when the male defendant (Alberto Magallon) entered the house."

We are not persuaded. David's assertion[3] that almost everything was stolen during the first incident is ambiguous in that it did not *exclude* Longoria's participation in that incident. Longoria asserts "the police reports attached to the habeas petition . . . [show that] a neighbor saw appellant helping load some boxes into [Magallon's] truck," and that "[i]t is clear from his statement . . . that Mr. Krumseik felt that defendant Alberto Magallon had alone stripped the house before appellant even arrived for her one time help." But these referenced police reports were not made part of either the record on appeal or the habeas corpus petition, and the chronology of the alleged separate incidents remains unclear.

Nor are we persuaded by Longoria's attempt to distinguish the two seminal probation restitution cases, *People v. Lent* (1975) 15 Cal.3d 481, and *People v. Carbajal, supra,* 10 Cal.4th 1114. In *Lent*, the restitution award was based on the victim's total

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3 At one of the restitution hearings, David told the trial court: "Your Honor, I would like to point out before starting this that there's two incidences [*sic*] involving at least the male defendant breaking in. Almost everything was stolen on the first incident. . . . [¶] . . . [¶] . . . The second time, the house was entered again, but as well as the garage. Things that were taken the second time were found at his place of residence."

loss, of $1,778, even though the defendant had been acquitted of the theft count that represented $1,278 of the total. *Lent* agreed the defendant could be held responsible for both amounts because, during a lengthy probation hearing, the trial court had taken additional testimony and concluded the defendant had perjured himself at trial and was, in fact, responsible for all of the victim's losses. (*People v. Lent, supra,* 15 Cal.3d at p. 487.) In *Carbajal*, the defendant was convicted of hit-and-run after colliding with a parked car. Hence, the defendant had undoubtedly caused the car owner's property damage, even though "in the context of the hit-and-run statute, the restitution condition may relate to conduct that is not in itself necessarily criminal, i.e., the probationer's driving at the time of the accident." (*People v. Carbajal, supra,* 10 Cal.4th at p. 1123, fn. omitted.)

The relationship between a defendant's conduct and a victim's loss need not be as close as the relationship in *Lent* and *Carbajal*.

In *In re I.M.* (2005) 125 Cal.App.4th 1195, the juvenile court granted probation after finding the minor had been an accessory after the fact to a gang-related murder. As a condition of probation, the juvenile court ordered the minor to pay restitution for the victim's funeral expenses. On appeal, the minor argued the restitution award was erroneous because his criminal liability arose from conduct occurring after the victim had already been killed by someone else. But citing *Carbajal*'s rule for awarding victim restitution in probation cases, *In re I.M.* held: "That a defendant was not personally or immediately responsible for the victim's loss does not render an order of restitution improper. . . . [T]he question simply is whether the order is reasonably related to the crime of which the defendant was convicted or to future criminality." (*Id*. at p. 1209.) "Where, as here, the defendant has been found to have been promoting and assisting gang conduct, the restitution order serves a rehabilitative purpose by bringing home to the defendant the consequences of his gang membership. . . . The effect of the order is to make defendant aware of the consequences of his choice by compelling him to share responsibility for the gang-related activities in which he in some way participated. The order also forces defendant to face the emotional and financial effects of gang-related

activity on the family of the victim. The restitution order was directly related to defendant's future criminality, and was an appropriate exercise of the trial court's discretion." (*Id.* at p. 1210.)

An instructive contrast to *In re I.M.* is the case of *People v. Leon* (2004) 124 Cal.App.4th 620, involving checks that had been stolen from the victim. Defendant Leon and codefendant Garza were each convicted of grand theft and passing forged checks. Leon had cashed one stolen check in the amount of $2,450, and Garza had cashed three stolen checks in the amount of $11,000. Overruling a probation department recommendation that Leon be ordered to pay the victim $2,450 in restitution, the trial court found Leon had been " 'part and parcel of what was occurring' " and ordered him to pay $13,450 jointly and severally with Garza. But Leon had been sentenced to prison and, therefore, the court of appeal reversed: "[B]ecause $11,000 of [the victim's] loss resulted from the crimes of Garza, not Leon, and nothing in the record suggests that Leon aided and abetted commission of Garza's crimes, the trial court was not authorized . . . to order Leon to pay restitution for a crime he did not commit." (*Id.* at p. 622.)

Longoria pled no contest to stealing property from a vacant house. Even if her participation had been limited to the smaller of her codefendant's multiple forays, there is still a reasonable relationship because all of the victim's economic loss was caused by the looting of the vacant house. To paraphrase *In re I.M.*, since Longoria had been found guilty of stealing from the Krumseik family home, "the restitution order serves a rehabilitative purpose by bringing home to the defendant the consequences of [theft] . . . The effect of the order is to make defendant aware of the consequences of [her] choice by compelling [her] to share responsibility for the [theft] related activities in which [she] in some way participated. The order also forces defendant to face the emotional and financial effects of [such looting] activity on the family of the victim. The restitution order was directly related to defendant's future criminality, and was an appropriate exercise of the trial court's discretion." (*In re I.M., supra*, 125 Cal.App.4th at p. 1210.)

We conclude the trial court did not err by imposing the full amount of victim restitution on Longoria.

2. *Continuance was properly denied.*

Longoria contends the trial court erred by denying her request to continue the restitution hearing so she could employ experts to contest the replacement values David put on the stolen property. This claim is meritless.

a. *Background*.

At the hearing on May 11, 2007, Longoria's defense attorney told the trial court her investigator had conducted a property search and determined that the burglarized house had been owned by the Betty Krumseik Trust since 1999. Counsel asserted the trustee "would have to come in to court to make representations as to what's missing and what's not missing. If [David Krumseik] has documentation that shows that he is that person, then we can move on from there. But until then, I don't believe we can proceed." In response, David said his mother had died on June 30, 2006, and that he had documentation at home showing he was the trustee of his mother's trust. The trial court continued the matter so David could bring in that documentation.

David brought the documentation to court on August 31, 2007. Because of David's privacy concerns, the trial court examined Betty's will and trust documents in camera. The trial court then announced that David was "the sole beneficiary of this particular property and upon [Betty's] death he was entitled to the property. So he's a legitimate claimant." At the end of the hearing, defense counsel asked "for additional time to hire experts to find out if these things are even worth what they say." The trial court refused because "both sides had plenty of opportunity to get whatever experts they wanted. So I'll deny that request by the defense to get an additional continuance to have experts appointed."

b. *Discussion*.

"A continuance will be granted for good cause (§ 1050, subd. (e)), and the trial court has broad discretion to grant or deny the request. [Citations.] In determining whether a denial was so arbitrary as to deny due process, the appellate court looks to the circumstances of each case and to the reasons presented for the request." (*People v. Frye* (1998) 18 Cal.4th 894, 1012-1013, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see *People v. Jenkins* (2000) 22 Cal.4th 900, 1037 ["A showing of good cause requires a demonstration that counsel and the defendant have prepared for trial with due diligence."].)

Longoria argues that, because there was an initial question regarding David's standing as a proper victim, a continuance to address the restitution amount should have been granted once the standing question was clarified at the August 2007 hearing. But the record indicates defense counsel knew in March 2007 what property David had reported stolen and what replacement values he was claiming. Despite this information, Longoria chose to defend against the imposition of restitution solely by contesting David's standing as a victim. This appears to have been an entirely meritless endeavor, and Longoria makes no lack of standing claim on appeal.[4] Longoria had ample opportunity to engage experts to challenge David's valuations. She did not exercise due

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[4] Section 1202.4, subdivision (k), includes the following provisions: "For purposes of this section, 'victim' shall include all of the following: [¶] (1) The immediate surviving family of the actual victim. [¶] (2) Any corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity when that entity is a direct victim of a crime. [¶] (3) Any person who has sustained economic loss as the result of a crime and who satisfies any of the following conditions: [¶] (A) At the time of the crime was the parent, grandparent, sibling, spouse, child, or grandchild of the victim. [¶][¶] (C) At the time of the crime was a person who had previously lived in the household of the victim for a period of not less than two years in a relationship substantially similar to a relationship listed in subparagraph (A)." It appears David could have qualified under any of these provisions.

diligence in preparing for the August 2007 restitution hearing and, therefore, she failed to show good cause for a continuance.

3. *Longoria's habeas corpus petition establishes a prima facie case of ineffective assistance of counsel.*

In her accompanying habeas corpus petition, Longoria asserts she wanted to speak at the restitution hearing but trial counsel told her that would not be permitted. Trial counsel has denied Longoria's version of events, and Longoria's appellate counsel has filed a declaration questioning trial counsel's honesty. These conflicting statements raise a serious question about whether the amount of the restitution award resulted from the ineffectiveness of trial counsel. We invited the People to respond to Longoria's petition for writ of habeas corpus, but they have not done so. We will issue an order to show cause returnable in the superior court.

a. *Factual background*.

The habeas corpus petition includes Longoria's declaration setting forth her versions of the theft and the subsequent trial court proceedings.

Longoria states she spent the night of April 8, 2006, at her friend Amy's house. As Longoria was leaving for work the next morning, Amy's boyfriend, Alberto, asked her "to give him a ride to his work not too far from there. He worked as a demolition man, hired to work on getting rid of debris and junk or help people move etc. He was often at the junk yard recycling things and dumping junk out of his truck. I know that this was his occupation because I personally knew of several legitimate people he had worked for in the past who were happy with his service."

Longoria's declaration continues: "When I got to what appeared to be an abandoned house, his work truck was already in the driveway and the gate wide open. I had to be at work, so I was annoyed when he then asked me to help him carry a couple of boxes of junk to his truck. . . . He handed me three boxes which I in turn brought to the driveway where his truck was. They were standard size storage boxes, (24x12x10) . . . I noticed that if I didn't leave soon I would be late for work. So I left him there to

finish his work and I went to my job. I didn't know there was a problem or that I was accused of theft until months later when I was told I had a warrant out for my arrest.

"I pled guilty to petty theft in this case with the understanding that there would be a restitution hearing and I heard that the monetary amount taken had been reported as very little. I was very upset at having to plead guilty at all but I felt I had [no] choice . . .

"I was never able to talk to the judge or make any statement about my minimal involvement as my attorney told me first that it was not the kind of hearing where I testify and second that I did not need to be in court on August 31, 2007.

"I did not see the transcript of the August 31, 2007 hearing until recently but had I been in court that day, and saw and heard what was happening, I would have spoken up and begged the judge to let me testify and I would have taken an oath and stated what I have stated here. Had I been in court on August 31, 2007, I would have refused to pay the almost $38,000 restitution ordered and would not have accepted probation on those terms." [5]

Longoria's trial attorney, Evelyn Burns, in a letter to appellate counsel Charles Khoury, stated the reason she did not have Longoria testify at the restitution hearing was that it would not have been in her interest. Burns explained: "[Longoria's] story to me originally was that she was being paid by the co-defendant to help him clean up the back yard of the house in question and that she had never stepped inside the residence. . . . [¶] In another conversation, she told me that the entire house was a mess and in her opinion, it had been broken into before. When I asked her how she would know about the condition of the house since she had not been inside, she admitted that she had entered the house in order to carry the oven out. . . . Later, she admitted to me that she did not trust the co-defendant. Ms. Longoria also had a prior record, which included theft related offenses. [¶] The focus of my argument in the Restitution Hearing was that [the]

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[5] "If a defendant believes the conditions of probation are more onerous than the potential sentence, he or she may refuse probation and choose to serve the sentence." (*People v. Olguin* (2008) 45 Cal.4th 375, 379.)

Prosecution had insufficient proof in regard to the restitution amount, and problems with proof as to who was the true victim in this case. In my view, Anna Longoria's testimony would have put the spotlight on her, rather than the problems the People had with proof. This would have been detrimental to our defense."

Burns added that, "in regard to the statement signed by Ms. Longoria . . . , I whole-heartedly disagree with her recollection of our conversation. As I recall, and my notes indicate, our conversations centered around the ridiculous claims made by Mr. Krumseik and the fact that the numerous continuances were costing Ms. Longoria money in lost wages. At the last two appearances, per her request, I appeared 977(a) for her [i.e., under section 977, subd. (a)(1), which provides that a misdemeanor defendant may appear by counsel only]. *She never expressed a desire to testify at the Restitution Hearing*." (Italics added.)

In her own declaration, Longoria contested Burns's version of their conversation: "First, *I am certain that Ms. Burns told me that I 'couldn't' testify in the restitution part of the hearing, because it was not that kind of hearing. She never said it would be in my best interest not to testify, only that I couldn't*. [¶] In her letter, she claimed that I originally told her that I was paid by the co-defendant to help him clean up the back yard of the house and then later changed my story, several times. That is not true. I would have never said that because it never happened." (Italics added.) "While I did tell her that the condition of the house was a mess and it looked like there was a serious need for clean up, I meant the outside of the house, not the inside. . . . I never did enter the house. . . . [T]he theft conviction [Burns] talked about was a shop-lifting charge for a pair of jeans and blouse from Bloomingdales when I was a teenager. I am now almost 40 years old! I think my record included a breach of the peace."

Longoria's appellate counsel has submitted a declaration stating that, when he asked Burns why she failed to put Longoria on the stand at the restitution hearing, Burns said "that she could not put Ms. Longoria on the stand because it was part of a 'plea bargain.' "

b. *Discussion*.

Longoria asserts the reason Burns did not have her speak at the restitution hearing was that Burns did not understand the difference between restitution as part of a criminal sentence and restitution as a condition of probation. "It will be argued that trial counsel's misunderstanding of the law of restitution and the facts of the plea bargain deprived petitioner of a meritorious defense to the restitution sought. That defense was her minimal involvement and her plea to a minimum charge, petty theft, with no evidence adduced at the hearing that her actions resulted in any more than a monetary loss appropriate for a petty theft conviction."

We conclude the habeas corpus petition establishes at least a prima facie claim that trial counsel's ineffective assistance resulted in Longoria being ordered to pay much more restitution than she otherwise would have been. Longoria asserts she did not testify at the restitution hearing because Burns told her that would not be allowed. Although, as discussed *ante*, the trial court had discretion to order Longoria to make restitution for all of the victim's losses, it might not have done so if Longoria had testified. (See *People v. Olguin, supra,* 45 Cal.4th at p. 379 ["at the sentencing hearing, a defendant can seek clarification or modification of a condition of probation"]; *People v. Foster, supra,* 14 Cal.App.4th at p. 947 [to support ineffective assistance of counsel claim for failing to request restitution hearing, defendant must show "that but for his counsel's conduct, the court was reasonably likely to have ordered a lesser amount or no restitution"].)

Therefore, we will issue an order to show cause returnable in the superior court for the purpose of conducting an evidentiary hearing on the issues raised in the petition for writ of habeas corpus. (See Pen. Code, § 1508; *People v. Romero* (1994) 8 Cal.4th 728, 739-740.)

DISPOSITION

The judgment is affirmed.

Having read and considered the petition for writ of habeas corpus, filed November 25, 2008, we conclude it should be considered in the first instance in the trial court because it may be necessary to conduct an evidentiary hearing on the issues raised therein. This court is not designed to conduct evidentiary hearings or to determine the credibility of witnesses. (*In re Hochberg* (1970) 2 Cal.3d 870, 873, disapproved on another ground in *In re Fields* (1990) 51 Cal.3d 1063, 1070, fn. 3.) Accordingly, we issue an Order to Show Cause returnable in the superior court for the purpose of conducting an evidentiary hearing on the issues raised in the petition for writ of habeas corpus. (See Pen. Code, § 1508; *People v. Romero, supra,* 8 Cal.4th at pp. 739-740.)

Counsel for the People shall serve and file a return to the petition with the superior court within 30 days of the date of this order.

Counsel for petitioner shall file a traverse within 30 days after receiving the return.

The superior court shall then establish a date for any necessary evidentiary hearing, after which it shall grant or deny relief based on the law and the facts as so determined. (See *People v. Romero, supra,* 8 Cal.4th at pp. 739-740.)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.